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No. 82-1579

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA, APPELLANTS

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10905, preempts state law authorizing the condemnation of an abandoned railroad line for the purpose of providing rail service.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This is an appeal from a decision of the United States Court of Appeals for the Eighth Circuit holding that the Interstate Commerce Act (49 U.S.C. (Supp. V) 10905) preempts a Minnesota law that authorizes the condemnation for railroad use of a rail line that had been abandoned with the approval of the Interstate Commerce Commission (ICC).

1. The Interstate Commerce Act provides that a rail carrier subject to ICC jurisdiction may abandon its lines or discontinue its operations "only if the Commission finds

that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. (Supp. V) 10903. The Act requires that the carrier file with the ICC an "application for a certificate of abandonment or discontinuance * * * and a notice of intent to abandon or discontinue * * *." 49 U.S.C. (Supp. V) 10904.

The Act also provides that the ICC shall publish in the Federal Register its findings "that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line" and that "[w]ithin 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line." 49 U.S.C. (Supp. V) 10905(c). If the ICC finds within 15 days that the offeror is "a financially responsible person (including a government authority)" and that the offer of assistance meets prescribed standards, it "shall postpone the issuance of a certificate authorizing abandonment or discontinuance * * *." 49 U.S.C. (Supp. V) 10905(d).

In the event the offeror and the carrier "fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation." 49 U.S.C. (Supp. V) 10905(e). Upon such request, the ICC is "to establish the conditions and amount of compensation * * * within 60 days," and this "decision * * * shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision." 49 U.S.C. (Supp. V) 10905(f)(1)(A) and (2). If the offer is withdrawn, "the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance * * *" (*ibid.*).

Under these provisions, the maximum time that may elapse from the publication of proposed abandonment to the conclusion of the process for subsidy or purchase is 110 days.

2. The relevant facts in this case are undisputed and are set forth in the opinion of the court of appeals (J.S. App. A2-A3). In July 1981, the Commission issued an initial decision pursuant to 49 U.S.C. (Supp. V) 10903 that the public convenience and necessity require or permit the abandonment of a 44-mile branch line of appellee Chicago and North Western Transportation Company (CNW). Pursuant to Section 10905, a group of shippers on the line submitted an offer of financial assistance to subsidize the operation of a 19.2-mile segment of the line in Minnesota (the Hayfield segment). The group also filed an administrative appeal from the initial decision insofar as it permitted abandonment of the Hayfield segment.

The Commission found that the shippers' group was a "financially responsible person" within the meaning of Section 10905(d) and, as required by that subsection, delayed the issuance of the certificate of abandonment that would have allowed CNW to cease operating the line. Because of the inability of the shippers' group and CNW to agree on a subsidy, the shippers' group asked the Commission, pursuant to subsection (e), to establish the conditions and level of subsidy. The Commission determined the subsidy level and, as a necessary part of that calculation, also determined the net liquidation value of the Hayfield segment to be $1,791,354. The shippers' group thereafter withdrew its subsidy offer as permitted under subsection (f)(2). J.S. App. A2.

In October 1981, the Commission affirmed its initial decision allowing the abandonment of the entire line,

including the Hayfield segment.[1] The Commission issued an abandonment certificate in November 1981. All of the foregoing actions occurred in timely compliance with the requirements of Section 10905. J.S. App. A2.

3. On December 17, 1981, CNW ceased operating the line. Thereafter, CNW made arrangements to salvage and utilize the track from this line in a project in Iowa. J.S. App. A3.

On March 31, 1982, members of the shippers' group formed appellant Hayfield Northern Railroad Company, Inc. (Hayfield Northern), a Minnesota public service corporation that has power under Minnesota law (Minn. Stat. § 300.04 (1982)) to condemn rail lines for railroad purposes. Hayfield Northern immediately filed suit in state court, alleging that it desired to condemn the right of way, track, and appurtenances of the Hayfield segment. It also sought a temporary restraining order to prevent CNW from dismantling the line. The state court granted the restraining order. J.S. App. A3.

CNW removed the suit to the United States District Court for the District of Minnesota and moved to dismiss on the ground that Section 10905 preempts state law authorizing condemnation of an abandoned rail line for railroad purposes. The State of Minnesota intervened on the side of Hayfield Northern in order to defend the applicability and validity of its statute. J.S. App. A3.

The district court granted summary judgment in favor of CNW because "federal law has preempted the state law as it

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[1]The shippers' group petitioned for judicial review in *Brownsdale Cooperative Ass'n* v. *United States*, No. 81-2333 (8th Cir. Dec. 3, 1981), and sought a stay pending review of the Commission's final decision. After the court denied the request for a stay, the shippers moved to dismiss their petition. The court granted this voluntary dismissal on January 14, 1982.

applies to procedures seeking continued rail service in connection with an abandonment" (J.S. App. A15). Accordingly, the court dismissed the complaint with prejudice and dissolved the restraining order (*id.* at A16).

4. The United States Court of Appeals for the Eighth Circuit granted a stay to Hayfield Northern upon the posting of a bond. After argument on the merits, the court of appeals dissolved the stay, affirmed the judgment of the district court, and remanded to that court "for a determination of the amount of damages due CNW on account of delay" (J.S. App. A12).

The court of appeals held that Section 10905 preempts the Minnesota statute because "the state law authorizing Hayfield Northern to condemn CNW's abandoned railroad line for continuing rail purposes 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " (J.S. App. 5, quoting *Fidelity Federal Savings & Loan Association* v. *de la Cuesta,* No. 81-750 (June 28, 1982), slip op. 10).[2] First, the court concluded that Section 10905 "makes provision for continued rail service an integral part of the federal abandonment process" (J.S. App. A6) and that "[t]he elaborate procedural detail of this scheme indicates that * * * the Commission [has] exclusive and plenary authority to provide for continuation of rail service in connection with abandonments" (*id.* at A7). In addition, the court found that state condemnation actions might involve " 'protracted legal proceedings' " that would frustrate "the benefits of the 110 day time schedule" under Section 10905 (J.S. App. A7). The court also found that state condemnation actions "would circumvent the Commission's determination of value" and would

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[2]The court of appeals confined its holding to state condemnation "for continued rail service" and did not decide "whether condemnation for non-rail public purposes would also be pre-empted by federal law" (J.S. App. A9).

deviate from the "expedited method by which sale price may be determined [under Section 10905]" (J.S. App. A8). Finally, the court rejected appellants' argument that the Commission and the federal courts had recognized that the Interstate Commerce Act does not preempt state authority to condemn abandoned rail lines (*id.* at A8-A11).

Following the denial of rehearing by the court of appeals (J.S. App. A16-A17), this Court denied appellants' motion to stay the issuance of the court of appeals' mandate (*id.* at A26-A29).

ARGUMENT

The resolution of the question presented in this case does not directly implicate the interests of the federal government. As discussed below, the abandonment authority of the Interstate Commerce Commission does not extend beyond the point at which the certificate of abandonment becomes effective.[3] Furthermore, we believe that no other statutory or programmatic interest of the United States would be materially affected by the exercise of the state's condemnation powers in this case. We therefore agree with appellants that the court of appeals erred in holding that the Interstate Commerce Act preempts state condemnation of an abandoned railroad line for the purpose of providing rail service.[4]

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[3]Of course, a new operator must obtain a certificate from the Commission before recommencing rail service. See 49 U.S.C. (Supp. V) 10901; 49 C.F.R. 1150.1 *et seq.; Common Carrier Status of States*, 363 I.C.C. 132, 138 (1980), aff'd *sub nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982).

[4]Because no direct federal programmatic interest is involved in this case, the ICC elected not to participate in the lower courts even though it believed that appellants "have the best of the argument, and that once a rail line has been abandoned, Section 10905 can no longer be viewed as preempting a state law condemnation" (J.S. App. A45; footnote omitted).

1. Appellants have not challenged that Congress, in the exercise of its power under the Commerce Clause, could preempt the condemnation of abandoned railroad lines. Cf. *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 17 n.26; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).[5] Therefore, the only question in this case is whether the Interstate Commerce Act does so.

As the Court has recently noted, "[t]he goal of any preemption inquiry is 'to determine the congressional plan.' " *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 4-5, quoting *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956). In making that inquiry, " 'we start with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts" (430 U.S. at 525; citation omitted).

Accordingly, it is well settled that " 'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.' " *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other

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[5]As a matter of constitutional principle, such a statute would be no different from the established federal preemption of state condemnation of rail lines prior to abandonment. See, *e.g.*, *In re New York, N.H. & H. R.R.*, 447 F.2d 428, 429-430 (2d Cir. 1971); *Massachusetts* v. *Bartlett*, 266 F. Supp. 390, 392-393 (D. Mass.), aff'd in relevant part, 384 F.2d 819, 819-820 (1st Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

conclusion, or that Congress has unmistakably so ordained.' " *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). And, where possible — as it is here — "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[6]

2. In light of these principles, it cannot be concluded that the Commission's abandonment authority under the Interstate Commerce Act preempts state condemnation of abandoned rail lines. Nothing in the Act suggests that the acquisition of an already-abandoned rail line and the resumption of service are "an integral part of the federal abandonment process" (J.S. App. A6) or that the Commission has "exclusive and plenary authority" over such matters "in connection with abandonments" (*id.* at A7). The Commission itself has recognized that it does not have the power to regulate the transfer of a rail line after a certificate of abandonment has taken effect. For example, in *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981), the Commission observed that "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition

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[6]These principles are especially apt in a case involving a state's condemnation authority, which is "part of its sovereign power" (*United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 277 (1943)) and "an attribute of sovereignty * * * [that] inheres in every independent State * * * [and is] necessary for the proper performance of governmental functions" (*Georgia* v. *City of Chattanooga*, 264 U.S. 472, 480 (1924)).

of, the property are matters subject to State law." See also *Chicago & N.W. Transp. -- Abandonment -- in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) ("after all conditions to an abandonment have been complied with and the certificate is *effective*, federal interest and Commission jurisdiction end");[7] *Common Carrier Status of States*, 363 I.C.C. 132, 135 (1980), aff'd *sub. nom. Simmons* v. *ICC*, 697 F.2d 326 (D.C. Cir. 1982) ("when a rail line has been fully abandoned, it is no longer a rail line and the transfer of the line is not subject to our jurisdiction").[8] The court of appeals' attempted distinction of these Commission decisions (J.S. App. A8-A11) is unpersuasive and does not rebut the Commission's determination that it lacks authority — let alone exclusive and preemptive authority — over transfers of abandoned rail lines.

The Commission does have "exclusive" and "plenary" authority over abandonments, *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co., supra*, 450 U.S. at 320, 321; and this authority extends to pre-abandonment offers of financial assistance under Section 10905. But this authority ends when the abandonment has taken effect. At that point, the issue is not — as the court of appeals believed — the "continuation of rail service" (J.S. App. A7) but rather the commencement of new service requiring a fresh certificate of public convenience and necessity from the Commission (see note 3, *supra*). The Commission's authority over abandonments, including its authority to facilitate continuing

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[7]This decision is reprinted in the appendix to appellants' joint supplemental memorandum (at A5).

[8]Furthermore, one court has assumed that states may condemn abandoned railroad lines. See *Chicago & N.W. Transp.* v. *United States*, 678 F.2d 665, 667, 669 (7th Cir. 1982). See also J.S. App. A38 (comments of the Association of American Railroads).

rail service pursuant to pre-abandonment offers of purchase or subsidy, does not establish federal control with respect to post-abandonment transfers of railroad lines.[9]

Furthermore, the Act and its legislative history are entirely silent on the question of preemption of state condemnation. Since Section 10905 expressly contemplates that an offer of financial assistance could be made by "a government authority" (49 U.S.C. (Supp. V) 10905(d)(1)), such silence on a matter as fundamental as condemnation " 'strongly suggests that Congress did not intend' " to displace state power (*United States* v. *Bass*, 404 U.S. 336, 350 (1971), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)) or "significantly change[ ] the federal-state balance" (404 U.S. at 349; footnote omitted). Indeed, Section 10905 explicitly allows an offeror to "withdraw his offer within 10 days of the Commission's decision [on the conditions and amount of compensation]" (49 U.S.C. (Supp. V) 10905(f)(2)). By this provision, Congress presumably intended that the situation would return to the status quo ante and that the offeror would be able to invoke whatever preexisting rights it might have -- including, in the case of a state, the right of condemnation.

The court of appeals' decision creates — apparently in perpetuity — a no-man's land in which abandoned rail lines

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[9]As this discussion makes clear, the court of appeals' decision is a far cry from a "logical extension" (Mot. to Aff. 19) of *Chicago & N.W. Transp.* v. *Kalo Brick & Tile Co.*, *supra*. In *Kalo Brick*, the Court held that the ICC's exclusive authority to regulate abandonment preempts a state court judgment for damages based on the discontinuance of rail service. In contrast to the present case, the Court in *Kalo Brick* found that the state award of damages "impose[d] sanctions upon a regulated carrier for doing that which only the Commission * * * has the power to declare unlawful or unreasonable" (450 U.S. at 324) and rested on "precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation" (*id.* at 326-327; footnote omitted).

may not be regulated by the ICC or condemned by the state.[10] To create a special class of property thus exempt from normal processes of government regulation is unwise and unwarranted. Rather, federal and state authority in this area should be "reconcile[d]" (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra*, 414 U.S. at 127) by holding that Section 10905 grants exclusive authority to the ICC over pre-abandonment transfers to preserve continued and uninterrupted railroad operations, but does not prevent the states from condemning rail lines on which service has been abandoned pursuant to ICC approval.

3. The court of appeals was led to its preemption holding by its conclusion (J.S. App. A7-A8) that the provisions for purchase or subsidy in Section 10905 were designed to be the exclusive means for acquiring a rail line in order to assure service to shippers. The court inferred such exclusivity from the time limits and valuation procedures specified in Section 10905.

However, nothing in the Act suggests that these provisions were meant to create an exclusive method for assuring rail service to shippers after a railroad has abandoned that service. Section 10905 simply provides one mechanism to assist those who seek to continue existing service; it allows them to take steps to acquire the line prior to abandonment and thus assure uninterrupted service. But there is no indication that Congress intended the possibility of pre-abandonment acquisition (under federal law) to displace all possibilities of post-abandonment acquisition (under state law). And the time limits and valuation procedures contained in Section 10905 were merely designed to regulate the

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[10]The court of appeals' opinion furnishes no guidance on such questions as the length of time following abandonment that state condemnation is preempted or whether and in what situations a change of circumstances would enable the state to exercise its condemnation power.

acquisition of lines prior to abandonment. They have nothing to do with post-abandonment acquisitions, and do not in any way imply that pre-abandonment offers of financial assistance are to operate to the exclusion of post-abandonment acquisitions.

a. As described above (see pages 2-3, *supra*), the process for resolving offers of financial assistance under Section 10905 is to last no longer than 110 days. During this time the issuance of a certificate of abandonment is postponed (49 U.S.C. (Supp. V) 10905(d)). Because a carrier cannot terminate service until the certificate of abandonment is issued (see, *e.g., Gibbons* v. *United States*, 660 F.2d 1227, 1232-1236 (7th Cir. 1981)), the effect of an offer of subsidy or purchase is to delay abandonment for up to 110 days.

The legislative history of the statute[11] shows that Congress intented to limit the duration of this deferral of abandonment in order to reduce the burdens on the carrier. Congress generally sought to "expedite[ ] abandonment proceedings by specifically setting forth time periods within which the Commission must act upon abandonment applications * * *." H.R. Conf. Rep. No. 96-1430, 96th Cong.,

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[11]Section 10905 was adopted in its current form in the Staggers Rail Act of 1980, Pub. L. No. 96-448, Section 402(c), 94 Stat. 1942. As originally enacted in 1976, Section 10905 allowed a shipper to cause abandonment to be delayed for six months by offering to subsidize or purchase a rail line authorized for abandonment, but the offer did not bind the railroad to sell or provide service under a subsidy. See Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127, 146, originally codified at 49 U.S.C. 1a. Congress subsequently recodified that provision, without substantive change, as 49 U.S.C. (Supp. II) 10905. See Pub. L. No. 95-473, 92 Stat. 1405; *Chicago & N.W. Transp.* v. *United States*, 582 F.2d 1043, 1048 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). The Staggers Rail Act of 1980 replaced that provision with a new Section 10905 that requires a rail carrier to sell the line or provide service under a subsidy if the offeror meets specified statutory standards. See H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 125 (1980).

2d Sess. 125 (1980); see 49 U.S.C. (Supp. V) 10904(b) and (c). With particular regard to Section 10905, Congress designed the 110-day provision to "protect[ ] carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H.R. Conf. Rep. No. 96-1430, *supra*, at 125. The background of this consideration is explained in the House Report:

> An enormous amount of time, effort, and expense has been expended contesting abandonments. Few challenges have been successful. * * *
>
> * * * * *
>
> [It is necessary to] avoid[] expensive protracted litigation * * * [and to] provide[] the carrier desiring to abandon a line a vehicle for prompt abandonment.

H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 43 (1980). See also S. Rep. No. 96-470, 96th Cong., 1st Sess. 39-41 (1979); 126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980) (remarks of Sen. Cannon) ("[t]he abandonment provisions * * * should eliminate much of the cost, delay, and uncertainty involved in abandonment proceedings").[12]

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[12]This situation was also described in *Chicago & N.W. Transp.* v. *United States*, 582 F.2d 1043, 1045-1046, 1049 (7th Cir.), cert. denied, 439 U.S. 1039 (1978):

> [A rail carrier seeking abandonment] would find itself enmeshed in "drawn-out hearings before the Interstate Commerce Commission." * * * The Senate Committee on Commerce * * * recognized [in 1975] that the abandonment problem plagued the entire railroad industry * * *[,] that "the regulatory climate constrained management's ability to * * * abandon obsolete properties and lines," and * * * that "the railroad industry should not be forced to continue to internalize all losses from branch line operations * * *."
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> * * * * *
>
> Congress * * * determin[ed] to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance.

Thus, Section 10905 is directed to delays that occur in the abandonment process. Because a carrier must maintain service until a certificate of abandonment is issued (see page 12, *supra*), such delays impose a significant burden on the carrier to continue operations that it is seeking to terminate as unprofitable and unnecessary. Section 10905 addresses this problem by limiting the postponement of an abandonment certificate to a maximum of 110 days.

State condemnation of already abandoned rail lines does not conflict with this congressional purpose. Once the process under Section 10905 has been completed without a purchase or subsidy, the carrier is granted a certificate of abandonment and is free to cease rail service. State condemnation of a rail line that has been abandoned cannot, by definition, interfere with the purpose of Section 10905 to diminish delay in the issuance of the abandonment certificate that relieves the carrier of its obligation under federal law to continue rail operations.[13]

b. The court of appeals was also incorrect in concluding (J.S. App. A8) that state condemnation "would circumvent the Commission's determination of value" of the Hayfield

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[13]We note that the facts of this case are unusual in one respect. Typically, a carrier that abandons a rail line simply leaves in place the track and other permanent physical facilities that had been used in providing service. Here, in contrast, appellee sought to remove these materials for use in another project but was enjoined from doing so by the temporary restraining order entered by the state court. Because the parties have not addressed the issue, we take no position on the propriety of the state injunction in light of either the provisions of Section 10905 or the specific orders of the Commission in this case (see Mot. to Aff. 17 n.16). We likewise take no position on the issue of the availability or amount of any "damages due CNW on account of delay" (J.S. App. A11) that the court of appeals remanded to the district court.